New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Comments on Proposed Amendment of Rule 3 of the Rules of the Commercial Division (22 NYCRR §202.70[g], Rule 3[a]), Relating to Selection of Mediators

COMMERCIAL & FEDERAL LITIGATION SECTION

Com-Fed #6 August 17, 2018

The Commercial and Federal Litigation Section of the New York State Bar Association ("Section") is pleased to submit these comments in response to the Memorandum of John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, dated June 22, 2018, proposing an amendment to Rule 3 of the Rules of the Commercial Division (22 NYCRR §202.70[g], Rule 3[a]), relating to the selection of mediators (the "Memorandum"). A copy of the Proposal is attached hereto as Exhibit "A."

I. EXECUTIVE SUMMARY

Rule 3(a) of the Rules of the Commercial Division currently permits the court to direct or counsel to seek appointment of a mediator to resolve all or some of the issues presented, at any stage of the litigation. The ADR Committee of the Commercial Division Advisory Council (the "Advisory Council") has made two recommendations: (1) that the language of Rule 3(a) be amended to include the following language: "Counsel are encouraged to work together to select a mediator that is mutually acceptable, and may wish to consult any list of approved neutrals in the county where the case is pending"; and (2) that the Office of Court Administration ("OCA") and State ADR Coordinator coordinate with local ADR Administrators in each Commercial Division to determine whether applicable ADR rules should be revised to provide a uniform five (5) business day deadline for the parties to agree upon a mediator before assignment by the court.

II. SUMMARY OF PROPOSAL

Rule 3(a) provides in part: "At any stage of the matter, the court may direct or counsel may seek the ***appointment*** of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation" (22 NYCRR § 202.70[g], Rule 3[a] (emphasis added)). Rule 3(a) refers to the "appointment" of a mediator, and the Advisory Council notes that various Commercial Divisions have implemented programs whereby mediators are appointed by the court from a roster of qualified neutrals, rather than by agreement between the parties.

Citing feedback from Bar Associations, the Advisory Council suggests that mediation may be more successful when parties are given the opportunity to agree upon a mediator. According to the Memorandum, statistically, where parties are permitted to first agree upon a mediator, agreement on a mediator is reached in approximately 70% of cases. In federal district courts, where the parties are first given the opportunity to agree upon a mediator, statistics show a settlement rate of around 70%.

The rationale asserted by the Advisory Council is that allowing the parties to agree upon a mediator facilitates greater trust in the competence of the mediator and greater party satisfaction, thereby increasing the settlement rate:

> "Experienced counsel recognize that identifying a mediator that all parties and counsel can trust will facilitate information exchange and help create a climate where settlement is more likely to occur – or at least will not be impeded by concerns about the competence, effectiveness and trustworthiness of the mediator."

(Proposal at 3).

While the Advisory Council believes a uniform five (5) business day rule is ideal, the Advisory Council recognizes that local concerns may weigh against adopting formal rule dictating a specific time period for party-selection of a mediator. Therefore, the Advisory Council has suggested an amendment to Rule 3(a) without any specific deadline, as follows:

> "At any stage of the matter, the court may direct or counsel may seek the appointment of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation. *Counsel are encouraged to work together to select a mediator that is mutually agreeable, and may wish to consult any list of approved neutrals in the county where the case is pending*. Additionally, counsel for all parties may stipulate to having the case determined by a summary jury trial pursuant to any applicable local rules or, in the absence of a controlling local rule, with permission of the court."

(Proposal at 4).

In addition, the Advisory Council suggests that the OCA and State ADR Coordinator coordinate with local ADR Administrators in each Commercial Division to determine whether the local ADR rules can be revised to provide a five (5) business day deadline to agree upon a mediator before one is appointed by the court.

COMMENTS:

The Section strongly agrees that confidence in the competence and experience of a mediator is essential to the mediation process, and that allowing party-selection of a mediator facilitates that confidence. The proposed amendment does not provide a firm deadline for party- selection of a mediator, thereby allowing each Commercial Division in the State to adopt its own rule to facilitate party-selection. Therefore, the Section recommends that the proposed amendment to Rule 3(a) be adopted, and agrees that the OCA and State ADR Coordinator should coordinate with local ADR Administrators to determine whether a five (5) business day deadline for party-selection of a mediator can be implemented.

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EXHIBIT A

NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

June 22, 2018

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Amendment of Rule 3 of the Rules of the Commercial Division (22 NYCRR §202.70[g], Rule 3[a]), Relating to Selection of Mediators

The Administrative Board of the Courts is seeking public comment on a proposed amendment of Rule 3 of the Rules of the Commercial Division (22 NYCRR §202.70[g], Rule 3[a]), proffered by the Commercial Division Advisory Council, to provide that litigating parties engaged in mediation in the Commercial Division be encouraged to select a mutually acceptable mediator to assist in the resolution of their disputes. In support of this proposal, the Council cites, inter alia, statistics demonstrating that parties are far more likely to settle matters before a jointly approved mediator than before a mediator appointed by another method (Exh. A. pp. 2-3).

The Board also seeks comment on the Council's proposal that the Office of Court Administration take steps to assess whether local ADR rules should be amended to provide that parties be given five (5) business days to agree upon a mediator in Commercial Division matters (Exh. A, p. 3).

Persons wishing to comment on these proposals should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than August 20, 2018.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

Proposal of the ADR Committee of the Commercial Division Advisory Council Concerning the Selection of a Mediator Under the Commercial Division Rules

May 23, 2018

In response to the various proposed new rules made by the Commercial Division Advisory Council to enhance the effective use of mediation in Commercial Division cases, numerous Bar Associations have shared their views as to the characteristics that help promote success. One such factor consistently cited by the Bar Associations has been that mediation tends to succeed when the parties and their counsel not only agree to pursue mediation, but also agree on the particular mediator. However, in reviewing court-annexed ADR programs throughout the state, not all programs are structured to place a priority on efforts to encourage agreement on the selection of the mediator. Thus, in light of the feedback that has been received and to help educate parties about this critical step to make the mediation process work, the ADR Committee recommends that Rule 3(a) of the Commercial Division Rules be modified to include the following language: "Counsel are encouraged to work together to select a mediator that is mutually acceptable, and may wish to consult any list of approved neutrals in the county where the case is pending." The ADR Committee further recommends that the OCA and Statewide ADR Coordinator coordinate with the ADR Administrators in each Commercial Division location to determine if it would be possible to revise their applicable ADR Rules to provide that parties be given five (5) business days to agree upon a mediator *before* the ADR Administrator takes additional steps to assign a mediator for the case.

Current ADR Rules Governing Mediator Selection

Commercial Division Rule 3(a) currently provides, "At any stage of the matter, the court may direct or counsel may seek the appointment of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation." The rule does not specify how a mediator is to be appointed. However, because of the reference to the "appointment" of a mediator, some court-annexed programs have designed a process for appointing a mediator from a roster of neutrals instead of first asking the parties to agree upon a neutral.

For example, in Queens County, the ADR Rules provide, "Upon receipt of the Order of Reference, the Program Administrator will randomly assign a Mediator chose from the Roster [of neutrals maintained by the court]." In Suffolk County, the Referring Justice appoints a mediator and the parties have fifteen (15) days to object to the individual appointed. In New York County, the applicable ADR Rules provide, "The Coordinator, in her discretion, may: (i) allow counsel to agree upon a Neutral from the Panel; (ii) provide counsel with the names of not fewer than three Neutrals from the Panel from among whom counsel shall select; or (iii) assign a Neutral from the Panel."

In contrast, in Nassau and Westchester Counties, the parties are given five (5) business days to attempt to agree upon a mediator *before* a process for appointment by the court proceeds. Similarly, in the 8th Judicial District, the parties are also first asked to agree upon a mediator; if they are unable to agree, each party submits three names to the Court and an ADR Administrator or the Judge selects one.

Bar Association Feedback on the Importance of Party Choice in Mediator Selection

In response to prior mediation proposals Bar groups have written that efforts to make court-annexed mediation more successful would be enhanced if parties were first given the opportunity to agree on a mediator – instead of having the court make its own selection. The New York State Bar Association Dispute Resolution Section has written, "We believe that this method of mediator selection is preferable to the present method by which the ADR Coordinator [in NY County] selects the mediator unless the parties agree to override that selection. Affording the parties more choice in the mediator selection process should improve the Commercial Division's current settlement rate and thus result in greater party satisfaction." The former chair of the New Jersey State Bar Association Dispute Resolution Section noted in an article in the New Jersey Law Journal that "[t]rusting the competence of a mediator is an important factor that enables the parties and counsel to use the full range of a mediator's skills and services" and that the New Jersey mediation rules foster this trust by encouraging attorneys to "party-select" their mediator within 14 days after entry of the Mediation Referral Order. (Laura A. Kaster and N. Janine Dickey, "Progress on the N.J. Mediation Front", New Jersey Law Journal (March 18, 2013).)

The former Co-Chairs of the NYSBA's Dispute Resolution Section's Committee on ADR in the Courts provided extensive analysis of the benefit of party-appointed mediators in submissions to the court system:

> When the parties are first given the opportunity to choose their mediator instead of being required to accept a mediator who they did not choose, we know from experience that the parties agree on the selection of a mediator in approximately 70% of the cases. When the [New York County's Commercial Division ADR Program was first established . . ., the parties were first given 5 business days within which to select a mediator, and if they failed to mutually agree on a mediator within that 5-day period, the ADR Coordinator would give them a list of potential mediators from which to choose . . . .
>
> Unfortunately, the mediator selection procedure in the Court's ADR Program changed some years ago to where the ADR Coordinator, instead of the parties, selected the mediator in the first instance. However, in only a small percentage of those cases do the parties override the default selection

> procedure. In the federal district courts where the parties are first given the opportunity to choose their mediator, the settlement rates have historically ranged from 67% (in the EDNY) to 72% (in the WDNY). However, after the mediation selection procedure in our [NY County] Commercial Division changed to the present system where the ADR Coordinator first makes the selection . . . the settlement rate has historically been less than 34%. . . . .

The ADR Committee agrees with this analysis. Experienced counsel recognize that identifying a mediator that all parties and counsel can trust will facilitate information exchange and help create a climate where settlement is more likely to occur – or at least will not be impeded by concerns about the competence, effectiveness or trustworthiness of the mediator. The ADR Committee believes that a modification to Rule 3 to encourage parties to agree on the selection of the mediator will help guide less experience counsel to take this critical step and further help set the stage for cooperation that will be necessary for settlement.

Furthermore, the ADR Committee believes that changing the ADR Rules in each Commercial Division ADR program to provide for party choice and party agreement on mediators in the first instance will enhance settlement rates and effectiveness. While we believe that a formal rule providing for the parties and counsel to have five (5) business days to agree on a mediator would be optimal, we are mindful of the fact that there are local rules governing ADR administration that may address local concerns about which our committee may not be aware. Consequently, instead of proposing a statewide change in the Commercial Division Rules to effect that result in the first instance, the ADR Committee recommends that the OCA and Statewide ADR Coordinator coordinate with the ADR Administrators in each Commercial Division location to determine if it would be possible to revise their applicable ADR Rules to provide that parties be given five (5) business days to agree upon a mediator before the ADR Administrator takes additional steps to assign a mediator for the case.

PROPOSAL

For the reasons set forth above, the Commercial Division Advisory Council recommends that Rule 3(a) of the Commercial Division Rules be amended to add the following underlined language:

Rule 3. Alternative Dispute Resolution (ADR); Settlement Conference Before a Justice Other Than the Justice Assigned to the Case.

a. At any stage of the matter, the court may direct or counsel may seek the appointment of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation. Counsel are encouraged to work together to select a mediator that is mutually acceptable, and may wish to consult any list of approved neutrals in the county where the case is pending. Additionally, counsel for all parties may stipulate to having the case determined by a summary jury trial pursuant to any applicable local rules or, in the absence of a controlling local rule, with permission of the court.

* * *

The ADR Committee further proposes that the OCA and Statewide ADR Coordinator coordinate with the ADR Administrators in each Commercial Division location to determine if it would be possible to revise their applicable ADR Rules to provide that parties be given five (5) business days to agree upon a mediator before the ADR Administrator takes additional steps to assign a mediator for the case.

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DISPUTE RESOLUTION SECTION

September 14, 2018

Via Email Only (rulecomments@nycourts.gov)
John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Dear Mr. McConnell:

On behalf of the New York State Bar Association Dispute Resolution Section, ("Section"), I write to thank you for the opportunity to provide comments on the June 22, 2018 public memorandum (the "Notice") issued by the Administrative Board of the Courts ("Administrative Board") on the Proposed Amendment of Rule 3 of the Rules of the Commercial Division, Related to Selection of Mediators ("Proposed Amendment"). The Section supports the Proposed Amendment.

The Section supports the use of mediation as a means of dispute resolution and encourages court practices that will expand the use of mediation as an alternative or complement to litigation. We believe that providing parties with the opportunity to select a mediator who is mutually acceptable to them would serve this goal. We note that we previously wrote on this issue. We appreciate that you included our comments from the previous letter in your Notice. Certainly, in private, party-initiated mediations, the selection of the mediator should have a positive effect on the outcome of the dispute. The Section reads the Proposed Amendment as non-mandatory, meaning that the parties may consult any list of neutrals in making their choice of mediator, and that they are not required to use any particular "list of approved neutrals in the county where the case is pending." Thus, parties may also choose a mediator from outside the county where the case is pending and, further, may choose a mediator who is not a member of a court-approved list of mediators. The non-mandatory nature of the proposed amendment, in the Section's view, serves the goal of encouraging mediation by fostering party autonomy and self-determination in structuring a mediation process that is suitable to the dispute, particularly when the use of mediation as a method for resolution was not, in the first instance, necessarily by choice.

Regarding the Commercial Division Advisory Council's proposal that the Office of Court Administration ("OCA") take steps to assess whether local ADR rules should be amended to provide that the parties be given five (5) business days to agree upon a mediator in Commercial Division matters, the Section again supports the proposal. The Section notes, however, that a slightly longer period may be appropriate in order to ensure that the parties have sufficient time to consider their options in choosing a mediator. Moreover, the Section acknowledges that the ADR Administrators in the individual Commercial Division courts should not be unduly burdened by the proposed changes. In that regard, the Committee notes that the New Jersey court mediation rules provide for fourteen (14) calendar days after the entry of the Mediation Referral Order during which the parties may jointly select a mediator of their own choosing[1]. Affording that slightly longer time period would advance both party autonomy in decision making – one of the core tenets of mediation – and ameliorate some of the burden on the ADR Administrator.

[1] R. 1:40-6(b) www.judiciary.state.nj.us/attorneys/assets/rules/r1-40.pdf

Thus, in substance, after the court orders a matter to mediation, the parties would then have fourteen (14) calendar days in which to (a) choose a mediator; (b) ensure that the mediator is available to mediate within the timeframe set out in the court's order; and (c) notify the ADR Administrator of the parties' choice of mediator, the mediator's qualifications, and contact information. Unless the ADR Administrator is notified by the parties that they have chosen a mediator, at the expiration of the fourteenth (14th) day, the Administrator would proceed with mediator selection through the court's other processes.

The issues surrounding mediator selection are not simple. Your proposals raise a few as do our comments. In particular, concerns have been raised that the proposed amendment may result in many of the same mediators being selected over and over again, with fewer opportunities being provided to mediators of diverse backgrounds and new mediators. Therefore, while endorsing the Proposed Amendment, we believe that its enactment should be accompanied by a broader discussion of mediator selection to encourage, and where possible to ensure, the inclusion of mediators with diverse backgrounds in the community of neutrals, and in particular, on Court-approved lists; to increase the diversity of mediators who are chosen by litigants or assigned by ADR Administrators; and to provide opportunities for newer mediators. When designing ADR programs and rules for administration, the courts should strongly consider that to expand the use of ADR in the courts, the pool of qualified neutrals must grow. And to grow the pool, newer mediators who are qualified but have less experience in the practice of mediation should be afforded opportunities to grow and hone their skills and become known to the bench, bar and litigation parties as the talented neutrals many are through being included on Court-approved lists and chosen by litigants. Perhaps this goal is met by expanding ADR, and mediation in particular, into courts of lesser jurisdiction than Supreme Court (and its Commercial Divisions), by providing observation and even co-mediation opportunities in certain cases, with party consent. We welcome the opportunity to work with the Administrative Board on these and other important issues pertaining to mediator selection.

We thank you for the opportunity to provide comment. We applaud the efforts that OCA is making "to revitalize the court system's commitment to alternative dispute resolution," and others who worked on the proposals, for their continuing efforts to improve the ADR services offered by the New York court system. We firmly agree with OCA that ADR is an integral part of providing an effective, high-quality, prompt, and efficient administration of justice.

Very truly yours,

Deborah Masucci

Deborah Masucci
Chair, NYSBA Dispute Resolution Section

September 17, 2018

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004
Via Email: rulecomments@nycourts.gov

Re: Commercial Division Mediator Selection Proposals:
https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/CommDivMediation.pdf

Dear Mr. McConnell:

The New York City Bar Association's President's Committee for the Efficient Resolution of Disputes and its Committee on Alternative Dispute Resolution and Council on Judicial Administration (the "Committees") submit this statement in response to your June 22, 2018 Request for Public Comment. We applaud the Commercial Division Advisory Council's ("Advisory Council") continued commitment to enhancing the effective use of mediation as a way to reduce both the cost and duration of litigation. We write in general support of the proposal, with the following comments for consideration.

I. PROPOSED CHANGE TO RULE 3

The first part of the solicitation of public comment would add this language into Rule 3(a) of the Commercial Division Rules: "Counsel are encouraged to work together to select a mediator that is mutually acceptable, and may wish to consult any list of approved neutrals in the county where the case is pending."

Although we do not know of a statistical basis for it, we agree that a trusted mediator can increase the parties' faith in the mediation process and we know that many practitioners believe that the parties having the choice of a mediator enhances the likelihood of success. In the view of many experienced practitioners, changing the current rule to afford the parties a reasonable time to agree on a mediator would be likely to promote greater confidence in mediation.

We agree with the Advisory Council's reliance on New Jersey's mediation rules as potential models for mediator selection. They provide a flexible process for selecting mediators and afford the parties a reasonable time to consider the best mediators for their dispute. They also helpfully provide a process for appointing a mediator when the parties want to select a mediator themselves but cannot agree on the best mediator for their case.

We support the placement of the proposed language in the paragraph about appointment of mediators. While some may view this change as a codification of current procedures, since parties and counsel are always free to pursue mediation, the new language serves as an important reminder by the court system that proactive consideration of mediation should be a natural component of litigation. Choosing a mediator who best meets parties' collective needs encourages cooperation between and among the litigants and their counsel. The process of working collaboratively to *begin* the mediation sets the stage for the collaborative work that happens *within* the mediation. Moreover, depending on the process actually implemented, if the parties choose their own mediator at the outset, it could save the work of several steps that the ADR coordinator would otherwise have to expend.

II. PROPOSED OUTREACH TO ADR COORDINATORS

The second part of the proposal on which comments are sought is an invitation by the Advisory Council's ADR Committee that OCA "coordinate with the ADR Administrators in each Commercial Division location to determine if it would be possible to revise their applicable ADR Rules to provide that parties be given five (5) business days to agree upon a mediator before the ADR Administrator takes additional steps to assign a mediator for the case."

We strongly endorse OCA including the local administrators in determining the local variants in rules that make the most sense in their locales and best serve that Court's constituencies. The goal of streamlining the work of the administrators is laudable on its own, in addition to it placing the selection process in the hands of the people closest to the mediation.

We suggest that the window of time for litigants to select a mediator be considered an open question to be discussed with local administrators. Some of our members think that five business days is too short, unnecessarily rushing the thorough analyses and cooperation that are expected by the rule change. One alternative that OCA and local administrators could consider is a 14-calendar day opportunity in which litigants would agree on a mediator.

III. RELATED SUPPORTIVE COMMENTS

The issues of mediator selection are complex and nuanced. Those raised by the current proposals, and commented on here, are only a subset of the many factors that go into the mediator selection process. The issues include, among others, increasing the diversity of backgrounds of the members of panels of neutrals, of neutrals receiving appointment, and of ADR practitioners generally.

We believe that in setting rules and designing ADR programs, the courts should have as one of their important goals the widening and deepening of the pool of neutrals who are actually selected or assigned in court-annexed mediations, not least so that qualified but less experienced mediators can grow and hone their skills and become known to the bench, bar and litigation parties as talented neutrals.

We would welcome the opportunity to discuss the issues of mediator selection that go beyond, but are consistent with, the current proposals.

Thank you for the opportunity to comment on this proposed change. We stand ready to assist OCA and local administrators in any way that would be helpful.

President's Committee for the Efficient Resolution of Disputes[1]
Erin Gleason Alvarez
Daniel F. Kolb
Co-Chairs

Committee on Alternative Dispute Resolution
Charles M. Newman, Chair

Council on Judicial Administration
Hon. Carolyn E. Demarest (Ret.), Chair

[1] The President's Committee was formed in 2017 by then-City Bar President John S. Kiernan. The Committee now continues its mission of encouraging efficiency and economy in New York dispute resolution practice under the sponsorship of the City Bar's current President, Roger Juan Maldonado. Our Committee is comprised of a cross-section of City Bar standing committees, including the Alternative Dispute Resolution Committee, Arbitration Committee, Cooperative & Condominium Law Committee, Council on Judicial Administration, Council on the Profession, In-House Counsel Committee, In-House/Outside Litigation Counsel Working Group, International Commercial Disputes Committee, Litigation Committee, and State Courts of Superior Jurisdiction Committee. Members include lawyers in private practice, arbitrators and mediators, acting and retired judges, court administrators, and in-house counsel.

[redacted]

From: Linda Maroko <linda.maroko@aderant.com>
Sent: Monday, July 30, 2018 5:18 PM
To: rulecomments
Subject: Proposed amendment of Rule 3 of the Rules of the Commercial Division

Categories: [redacted]

Dear Mr. McConnell,

We are writing with respect to the request for public comment on proposed amendment of Rule 3 of the Rules of the Commercial Division (22NYCRR §202.70[g], Rule 3[a]), out for comment until August 20, 2018, relating to the selection of mediators.

We do not have a comment specifically relating to the proposed language amending Rule 3. However, we note that the ADR Committee of the Commercial Division Advisory Council also is recommending that the Office of Court Administration and Statewide ADR Coordinator coordinate with the ADR Administrators in each Commercial Division location to determine if it would be possible to revise their ADR Rules to provide that the parties be given 5 business days to agree upon a mediator before the ADR Administrator takes additional steps to assign a mediator for the case. There is nothing in the recommendation that indicates when the 5 business day deadline would begin to run.

To avoid any ambiguity or uncertainty in any new rules adopted, we respectfully suggest that, during the coordination process, any proposed rules crafted contain a date certain for the commencement of the 5-day time period within which the parties may agree upon a mediator. For example, the rule could state that the time begins to run "on the date of notification of issuance of an order of reference to mediation" (currently used in the 9th Judicial District, Westchester County, Commercial Division Rules, ADR Program Rule 3).

Thank you for your time and consideration.

Sincerely,

Linda Maroko
Associate Rules Attorney

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August 15, 2018

John W. McConnell, Esq. , Counsel
Office of Court Administration
15 Beaver Street, 11th Floor
New York, New York 10004

Dear Mr. McConnell: Re: Proposed Amendment Rule 3 of the Rules of the Commercial Division

I submit this comment, as a Mediator on the Roster of Mediators of the Commercial Division, Supreme Courts, Nassau, Queens and New York Counties. I also write as having served in house for two Fortune 100 companies for more than thirty (30) years, during which time I acted in Mediations on occasion as the client. (see my background identified below).

Proposed Amendment to Rule 3:

I could be mistaken regarding the statistical basis for your assertion that the proposed change will increase parties' faith in the mediation process and enhance the likelihood of success. Differing results in U.S. courts and Commercial Divisions is in my view respectfully comparing apples and oranges because factors other than methods of choosing the neutral lead to differences in the likelihood of resolution. E.g., in a case brought under the Fair Labor Standards Act (FSLA) in federal court, parties are strongly motivated to settle. My own experience as a Mediator in the above state Courts leads me to express the view that the system best designed to achieve your stated goals is one where the respective Supreme Courts, acting through well qualified and experienced Administrators select Mediators from existing and future Rosters for each case, and subject to conflict of interest considerations, advocates would not play a major role early in the selection process. I know, not as an anecdote but from real experience, that such a process has not affected the successful resolution of cases sent to ADR. This 'comment' is based on a complete

knowledge of the vital role of advocates in any legal dispute that brings with it a nuanced set of contradictions in 'choosing a Mediator', including an advocate's primary duty of zealously representing his respective client at all times, and his focus on knowing as much about his adversary's case as possible. I know from years as in house client and now as a Mediator the difficulties and pressures of the role of outside counsel, and it asks 'too much' for them to put aside the other good faith factors, in choosing a neutral. Representation of his own client continues to be the main goal of each attorney in 2018, while acting in good faith in ADR. I simply assert that the proposed Rule 3 will not advance the goals set by the Advisory Council, i.e. the resolution of a case before trial. The court acting through well trained and experienced Administrators is better suited to assign Mediators for each case based on the many factors unique to that case. I hold this opinion based on Mediations conducted in the Supreme Court, Commercial Divisions for the above identified counties, and also based on my years as in house counsel where I acted as the client in Mediations.

William J.A. Sparks, Esq.
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Roster of Mediators, Supreme Court of the State of New York, Commercial Division, Nassau County, Queens County, New York County;
Member, Nassau County Bar Association (NCBA) Mediation & Arbitration Panels;
NCBA ADR Committee Co-Chair June 2017 – May 2018;
Member, ADR Committee, Bar Association of the City of New York, 2016 – 2019;
Member, ADR Section, New York State Bar Association (NYSBA);
Member, ADR Committee, International Association of Defense Counsel (IADC);
Admitted to Practice NY (1974); NJ (1979); FL (1992)

MEMORANDUM

TO: Office of Court Administration

FROM: Commercial Division Advisory Council

DATE: October 16, 2018

RE: Proposed Amendment to Commercial Division Rule 3
Concerning Mediator Selection

The Commercial Division Advisory Council has reviewed the five public comments to the proposed amendment to Commercial Division Rule 3, including the endorsements from the NYSBA Commercial and Federal Litigation Section, the NYSBA Dispute Resolution Section, and the New York City Bar Association's President's Committee for the Efficient Resolution of Disputes, Committee on Alternative Dispute Resolution and Council on Judicial Administration. As you know, the proposed amendment, in cases in which the court directs or the parties choose mediation, would encourage counsel to work together to select a mutually acceptable mediator. Moreover, the proposal recommends that the Office of Court Administration and the Statewide ADR Coordinator coordinate with the ADR Administrators in each Commercial Division location to determine if it would be possible to revise their applicable ADR Rules to provide that parties be given five (5) business days to agree upon a mediator *before* the ADR Administrator takes steps to assign a mediator for the case.

Based upon our consideration of the comments, the Commercial Division Advisory Council continues to endorse the proposal and urges its adoption. The Advisory Council, however, agrees with the comments of the New York City Bar and the NYSBA Dispute Resolution Section that, depending on the circumstances of the various local jurisdictions, a 14-day period, rather than a 5-business-day period, for the parties to select their mediators may be more appropriate, and, therefore, offer both time periods for the local ADR Administrators to consider. The Advisory Council further agrees that the time period selected for identifying a mutually acceptable mediator should run from a date certain, but defers to the ADR Administrators in crafting their local rules to select the date certain.

Summary of Comments and Response

No opposition was received from any Bar Association or any business association. The proposal was endorsed by the NYSBA Commercial and Federal Litigation Section, the NYSBA Dispute Resolution Section, and the New York City Bar Association's President's Committee for the Efficient Resolution of Disputes, Committee on Alternative Dispute Resolution and Council on Judicial Administration.

The NYSBA Commercial and Federal Litigation Section wrote, "The Section strongly agrees that confidence in the competence and experience of a mediator is essential to the mediation process, and that allowing party-selection of a mediator facilitates that confidence. . . .

[T]he Section recommends that the proposed amendment to Rule 3(a) be adopted, and agrees that the OCA and State ADR Coordinator should coordinate with local ADR Administrators to determine whether a five (5) business day deadline for party-selection of a mediator can be implemented."

Supportive comments were also received from the New York City Bar Association's President's Committee for the Efficient Resolution of Disputes, Committee on Alternative Dispute Resolution and Council on Judicial Administration (collectively, the "NYC Bar"). The NYC Bar wrote, "[W]e agree that a trusted mediator can increase the parties' faith in the mediation process and we know that many practitioners believe that the parties having the choice of a mediator enhances the likelihood of success. In the view of many experienced practitioners, changing the current rule to afford the parties a reasonable time to agree on a mediator would be likely to promote greater confidence in mediation."

The NYC Bar continued, "We support the placement of the proposed language in the paragraph about appointment of mediators. . . . Choosing a mediator who best meets parties' collective needs encourages cooperation between and among the litigants and their counsel. The process of working collaboratively to *begin* the mediation sets the stage for the collaborative work that happens *within* the mediation."

As for the proposed coordination with local ADR Administrators to set a time within which the parties should be permitted to select mutually their mediator, the NYC Bar wrote, "We strongly endorse OCA including the local administrators in determining the local variants in rules that make the most sense in their locales and best serve that Court's constituencies." However, the NYC Bar recommended that the time period be left unspecified, perhaps considering a 14-calendar day period as an alternative: "Some of our members think that five business days is too short, unnecessarily rushing the thorough analyses and cooperation that are expected by the rule change."

The NYSBA's Dispute Resolution Section offered similar comments: "The Section supports the Proposed Amendment. . . . We believe that providing parties with the opportunity to select a mediator who is mutually acceptable to them would serve this goal [of expanding the use of mediation as an alternative or complement to litigation]." On the issue of the time period within which mediator selection should be made after reference to mediation by the Court, the NYSBA Dispute Resolution Section also suggested a 14-day period: "The Section notes, however, that a slightly longer period may be appropriate in order to ensure that the parties have sufficient time to consider their options in choosing a mediator. . . . Thus, in substance, after the court orders a matter to mediation, the parties would then have fourteen (14) calendar days in which to (a) choose a mediator; (b) ensure that the mediator is available to mediate within the time frame set out in the court's order; and (c) notify the ADR Administrator of the parties' choice of mediator, the mediators' qualifications, and contact information." Finally, the Section "applaud[s] the efforts that OCA is making 'to revitalize the court system's commitment to alternative dispute resolution,' and others who worked on the proposals, for their continuing efforts to improve the ADR services offered by the New York court system."

The Commercial Division Advisory Council agrees with the suggestions made by the NYC Bar and NYSBA's Dispute Resolution Section. The five (5) business day time frame included in the proposal was based on the success of existing Commercial Division ADR programs that use that time frame in Queens and Westchester Counties. However, the proposal expressly left for the OCA, Statewide ADR Coordinator and local ADR Administrator the discretion to determine the time frame that best suited local needs. It may well be that, for a particular locale, a 14-day period might be better suited than the 5-day time period in the original proposal. The Advisory Council, therefore, offers both time periods for the local ADR Administrators to consider.[1]

A legal software company named Aderant noted that the five (5) business day time period suggested in the proposal did not identify the triggering event that would start the 5-day clock for the parties to mutually select their mediator. Aderant suggested such a rule contain a date certain for the commencement of the period: "For example, the rule could state that the time begins to run 'on the date of notification of issuance of an order of reference to mediation' (currently used in the 9th Judicial District, Westchester County, Commercial Division Rules, ADR Program Rule 3)."

The Advisory Council agrees with the suggestion. The focus of the proposed rule was to provide for the parties to first be able to select their own mediator before ADR Administrators were to undertake the effort to identify a mediator. Our focus was not on the particular phrasing of the local ADR Rules. However, the Advisory Council agrees that providing clarity to new deadlines in any rule change would only help the parties. Since under the proposal any time periods would be subject to the discussions among the OCA, Statewide ADR Coordinator and local ADR Administrators, we trust that appropriate clarity will be addressed in those discussions.

Finally, of the over 200,000 lawyers in New York, only one individual registered opposition to the proposal. The author of the comment is a former in-house counsel and currently a mediator on the rosters for the Commercial Division in Nassau, Queens and New York Counties. He indicated that based on his own experience, better results are achieved when the ADR Administrators select the mediator based on the many factors unique to the case. He believes that outside counsel are too focused on their duty to zealously represent their clients' interests and that it asks too much for them to put aside that goal in choosing a neutral.

The Advisory Council disagrees. Outside counsel do not put aside their obligations to their clients when they choose to mediate or select a mediator. To the contrary, their clients have an interest in an efficient and cost-effective successful resolution of their disputes, and mediators often can help clients and outside counsel achieve these objectives. Although ADR Administrators play a critical role when counsel cannot agree on a mediator, advocates and clients are sophisticated enough to find mediators who will help them convey their positions, arguments and interests to other parties and help them find settlements that meet their needs. Indeed, the Advisory Council believes, as do the bar organizations that have offered comments,

[1] The Advisory Council notes that both the NYC Bar and NYSBA's Dispute Resolution Section underscored the importance of increasing the pool of mediators and the diversity of mediators available to parties. The Advisory Council agrees with these goals, but notes that they are beyond the scope of the proposed changes to Rule 3.

that by collaborating to identify a mediator, counsel and parties can set the stage for the cooperation that will ultimately help yield a settlement.

Conclusion

Consistent with the public comments, the Advisory Council continues to urge the adoption of the proposed amendment to Rule 3, which, in cases in which the court directs or the parties choose mediation, would encourage counsel to work together to select a mutually acceptable mediator. Moreover, the Advisory Council continues to recommend that the Office of Court Administration and the Statewide ADR Coordinator coordinate with the ADR Administrators in each Commercial Division location to determine if it would be possible to revise their applicable ADR Rules to provide that parties be given a specified time to agree upon a mediator *before* the ADR Administrator takes steps to assign a mediator for the case – whether that be five (5) business days, fourteen (14) calendar days, or some other time period – commencing from a date certain after assignment to mediation – agreed upon by the ADR Administrator, the OCA and the Statewide ADR Administrator.